Supreme Court, U.S.
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No. 03-173

IN THE

# United States Supreme Court

IN RE: WILLIAM A. TOTO

*On Petition For A Writ of Mandamus*
*To The United States Court of Appeals for the Eleventh Circuit*

## OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS

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## QUESTION PRESENTED FOR REVIEW

Did the Eleventh Circuit's denial of petitioner's motion for appellate attorney's fees and expenses constitute a proper exercise of judicial power and discretion?

## PARTIES TO THE PROCEEDING

The following parties were the Plaintiffs-Appellants-Cross-Appellees below and are the Respondents before this Court: D. Bruce McMahan Nemesis Veritas, f.k.a. McMahan & Company.

The following party was the Defendant-Appellee-Cross-Appellant below and is the Petitioner before this Court: William A. Toto

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## STATEMENT OF THE CASE

This was an action for tortious interference with contractual relations. Petitioner Toto caused former limited partners of respondent Nemesis Veritas L.P. to sue it and respondent D. Bruce McMahan under, *inter alia*, the Racketeer Influenced and Corrupt Organizations Act in violation of assignments and releases contained in Contracts of Sale and Security Agreements (the "Contracts") whereby said limited partners sold their interests to respondents. The action sought $30 million in damages.[1]

The consolidated appeals and cross-appeals in this case concerned various orders of the United States District Court for the Southern District of Florida. They were decided by the Eleventh Circuit Court of Appeals July 10, 2001 opinion, *McMahan v. Toto*, 256 F.3d 1120 (11th Cir. 2001), *amended* 311 F.3d 1077 (11th Cir. 2002) (the "July Opinion"). The July Opinion: (1) affirmed the District Court's grant of summary judgment dismissing the complaint and therefore denied a portion of Appellants' appeal; (2) reversed the District Court's grant of attorney's fees pursuant to Fla. Stat. §768.79 and therefore granted that part of Appellants' appeal; and (3) affirmed the trial court's denial of sanctions against appellants and their counsel.

Petitioner does not mention that in orders entered July 13, 2001 (App., infra. 21a) and December 11, 2001 (App., infra, 23a), petitioner was denied his motions for appellate attorney's fees. All fee claims other than those contained in the bills dated December 21, 2001 and February 8, 2002 were

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[1] In support of his claim for inflated counsel fees, Petitioner repeatedly mischaracterized the claim as one of $90 million.

thereby decided adversely to petitioner. Petitioner never applied to recover costs. Further, petitioner never petitioned this Court in connection with the orders entered December 11, 2001 or July 13, 2002 denying him appellate attorney's fees.

Prior to the issuance of the mandate, and on September 30, 2001, *BDO Seidman v. British Car Auction, Inc.*, 802 So.2d 366 (Fla 4th DCA 2001) was decided. *BDO Seidman* contradicted the Eleventh Circuit's holding in the instant case that Fla. Stat. §768.79 did not apply in a diversity case litigated in Florida where the substantive issues were governed by the law of another state. *Seidman* specifically refused to apply a conflict of laws analysis as required under Federal law. *Seidman* cited to the court's decision and was undoubtedly "picked up" by shepardizing this case.

Petitioner thereupon renewed its prior motion for reargument. The billing records disclose that Petitioner was purportedly charged $4,483 for 25.55 hours of work primarily performed by law clerks to bring *BDO Seidman* to this Court's attention.

By opinion dated November 6, 2002, (311 F.3d 1077) the Eleventh Circuit rescinded part of its July Order (the "November Opinion") and held that, while there was no controlling authority when it issued its July Opinion, *BDO Seidman* now represented Florida law on the issue of whether Fla. Stat. §768.79 applied in a federal diversity case litigated in Florida where the substantive issues were governed by the law of another state. Accordingly, this Court reversed its prior opinion and held that attorney's fees were recoverable by Petitioner.

Petitioner then moved for appellate fees again by petition filed on November 18, 2002 asking for appellate fees of

$103,901.14 (Pet. App. 98a). Respondents opposed the application on a number of grounds. The Eleventh Circuit agreed with the reasons set forth in respondents' opposition, and denied the motion for appellate fees in its order filed February 4, 2003 (Pet. App. 3a). The Eleventh Circuit also denied petitioner's motion for reconsideration of the denial of fees and for recall of the mandate (Pet. App. 1a).

## REASONS FOR DENYING THE PETITION FOR A WRIT OF MANDAMUS

Petitioner concedes that the issuance of a writ of mandamus "is not a matter of right, but of discretion sparingly exercised." Supreme Court Rule 20.1 (Pet. 17)

Petitioner can not justify the granting of a writ of mandamus. "To justify the granting of any such writ, the petition must show that [1] the writ will be in aid of the Court's appellate jurisdiction, [2] that exceptional circumstances warrant the exercise of the Court's discretionary powers, and [3] that adequate relief cannot be obtained in any other form or from any other court." Supreme Court Rule 20.1

### A. There Is No Justification for Granting the Writ of Mandamus

#### (1) Petitioner Admits There Was Another Remedy Available

The most obvious reason to deny petitioner's request for the issuance of a writ of mandamus, is that he admits that he had another remedy available, namely to file a petition for a writ of certiorari from the various orders denying him attorney's fees (Pet. 18). The stated reason for failing to file a petition for certiorari was that relief for certiorari was only

granted "in a tiny fraction of cases." This argument is specious given this Court's rule that a writ of mandamus is granted only "sparingly", as opposed to a writ of certiorari which is granted as a matter of "discretion". *(Cf.* Supreme Court Rules 10 and 21)

Further, it is obvious that petitioner waived any remedy available through a writ of certiorari, in that he failed to file a timely petition for such a writ within ninety days after entry of the orders appealed from. (Supreme Court Rule 13.1).

Petitioner cannot intentionally default in seeking another remedy and then use his own dereliction as a reason that no other remedy is available. Notably, petitioner fails to explain the reason for totally failing to seek relief from the December 11, 2001 and July 13, 2002 denials of petitioner's motions for appellate fees much less an explanation of why he waited over five months to seek relief from the Eleventh Circuit's February 4, 2003 and March 28, 2003 orders denying him attorney's fees.

Since granting a writ of mandamus is guided by equitable principles, laches is a ground for denial of a request for issuance of a writ of mandamus. *See NBS Imaging Systems, Inc., v. United States District Court for the E. Dist. Of Cal.*, 841 F.2d 297, 298 (9th Cir. 1988) (petitioner delayed in filing petition and court was reluctant to grant writ.) Here, for over five months, respondents have relied on being told by a United States Circuit Court of Appeals over and over that they are not responsible for the excessive amount of appellate legal fees petitioner seeks. To change that holding at this late date will prejudice respondents.

Here, equity should preclude the granting of a writ of mandamus on the grounds of laches.

**(2) There Are No Exceptional Circumstances Warranting Issuance of a Writ of Mandamus**

The Eleventh Circuit Court of Appeals did not abuse is discretion in deciding petitioner's motions for fees against it without reasons stated in an opinion. The court of appeals had a motion before it and decided it. While a writ of mandamus may lie where a court has failed to decide a motion and render a judgment, where as here, the court decided the motion before it and rendered judgment, a writ of mandamus is not available to change the judgment, "erroneous or not". *See, In Re Many,* 55 U.S. 24, 25 (1852). That is because mandamus is restricted to situations where ministerial duties of a nondiscretionary nature are involved. *Panama Canal Co. v. Grace Line, Inc.,* 356 U.S. 309, 78 S.Ct. 752 (1958). *Accord: Weber v. Coney,* 642 F.2d 91 (5th Cir. 1981).

Further, there is no rule mandating that the Eleventh Circuit Court of Appeals must state its reasons for the granting or denial of a motion for appellate attorney's fees over which it has the sole authority to decide. Here, having to expressly state the reasons for denial of a motion for appellate attorney's fees are particularly irrelevant since, as petitioner concedes (Pet. 18), it is the circuit court alone which has the authority to set the amount of appellate fees incurred before it. (Pet. 18); *Davidson v. City of Avalon Park,* 848 F.2d 172 (11th Cir. 1988).

Moreover, petitioner implicitly agrees (Pet. 2) that appellate fees are awarded under Fla. Stat. §768.79, by virtue of Fla. Stat. §59.46, to the *prevailing party*. *See also, Krys v. Lufthansa,* 119 F.3d 1515, 1530 (11th Cir. 1997). In fact, petitioner posits as his first "guess" at a possible unstated reason for the denial of fees is because the Eleventh Circuit

Court of Appeals did not view petitioner as the "prevailing party" as required for recovery of appellate attorney's fees under Fla. Stat. §768.79. The Eleventh Circuit obviously did not view petitioner as the "prevailing party" where there was merely a change in the law after the parties briefed their positions with the Court and after the Court had already ruled in respondents' favor.

Here, petitioner had won on the issue of summary judgment, but lost on the issues of whether respondents were liable under 28 U.S.C. §1927 and under Fla. Stat. §57.105. Petitioner was also unsuccessful on the issue of attorney's fees under Fla. Stat. §768.79 throughout all the briefing period. By happenstance, a decision the Eleventh Circuit Court of Appeals felt was controlling in the absence of any other authority came along the very day that court denied petitioner's request for rehearing after losing on the attorney's fee issue. The Eleventh Circuit thus decided that petitioner was not the prevailing party.

Petitioner's assertion that the Eleventh Circuit had no discretion to do anything but award appellate attorney's fees to petitioner is incorrect. "Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" *Allied Chemical Corporation v. Daiflon, Inc.*, 449 U.S. 33, 101 S.Ct. 188 (1980) (citations omitted). Mandamus simply will not lie to compel adjudication in a particular way a party wants. *Interstate Commerce Commission v. U.S. ex rel. Campbell*, 289 U.S. 385, 53 S.Ct. 607 (1933).

For these reasons alone, the petition for mandamus must be denied since the Eleventh Circuit acted well within is jurisdiction and power.

**(3) There is No "Appellate Jurisdiction" Over The**

**Fees Issue**

It is the Court of Appeals that has the only authority to set legal fees. Therefore, even if this Court were to remand the case back to the Eleventh Circuit for a fuller statement of reasons why it denied petitioner's motions for appellate attorney's fees, petitioner would still not be entitled to any further relief since it is the Circuit Court, not this Court which has the authority to set the amount of fees. Moreover, without any further remedy, there is no point in issuing a writ of mandamus to make the Eleventh Circuit go through a worthless exercise.

Under 28 U.S.C. §1651(a), an extraordinary writ such as mandamus may issue only if it is necessary or is appropriate in aid of jurisdiction. *See also, Turner Broadcasting Sys. v. FCC*, 507 U.S. 1301, 113 S.Ct. 1806, 1807 (1993).

Here, an extraordinary writ is not necessary, nor does it aid the appellate jurisdiction of this Court. Nor can an extraordinary writ enlarge the jurisdiction of a court under the 28 U.S.C. §1651 where, as here, petitioner admittedly could have brought a petition for certiorari. *See generally, Clinton v. Goldsmith,* 526 U.S. 529, 537, 119 S.Ct. 1538 (1999).

**B. Grounds Lay in the Record for Denial of Petitioner's Motion for Appellate Attorney's Fees**

Further, remand for clarification, which is what petitioner is asking for here, is not required, where it is clear from the record that the lower court accepted an opponent's arguments found in the record. *See, e.g., Ross Brothers Construction Co., Inc. v. International Steel Services, Inc.*, 283 F.3d 867, 873 (7th Cir. 2002). *Accord: U.S. v. Nonahal*, 338 F.3d 668 (7th Cir. 2003). The Eleventh Circuit obviously denied petitioner's

motions for appellate fees for the reasons set forth in respondents' opposition to the initial motion and the motion for reconsideration. See, App. 1a-25a. Respondents made a number of arguments, which are described below.

**(1) Any Claim for Costs Was Untimely**

Petitioner sought to recover $100,658.83 in appellate fees and $3,242.31 in costs. In their opposition, respondents argued *inter alia*, that petitioner was foreclosed from seeking costs under Fed.R.App.P. Rule 39 due to untimeliness. Rule 39(d)(1), Fed.R.App.P., provides that "[a] party who wants costs taxed must – within 14 days after entry of judgment – file with the circuit clerk, with proof of service, an itemized and verified bill of costs." The Eleventh Circuit's Internal Operating Procedure "1" for Fed.R.App.P. Rule 39 confirms the 14 day requirement and also provides that "[t]he filing of a petition for rehearing or petition for rehearing *en banc* does not extend the time for filing a bill of costs."

If petitioner ever wanted costs taxed in his favor, he was required to, but did not, file such a request by July 24, 2001 in connection with the July Opinion. Petitioner apparently never sought costs in connection with the November Opinion. Additionally, the Clerk of the Eleventh Circuit Court of Appeals determined that "[e]ach party to bear its own costs", recognizing that these consolidated appeals netted a mixed result for both parties.

**(2) The Eleventh Circuit Had Already Denied Petitioner's Prior Fee Applications**

Respondents argued that the Eleventh Circuit had already held that petitioner was not entitled to appellate attorney's fees. Petitioner previously moved for appellate attorney's fees

in connection with appeals of the District Court's grant of summary judgment and attorney's' fees under Fla. Stat. §768.79. The motions were fully briefed by the parties. As discussed *infra*, the motions were denied by Orders entered December 11, 2001 and July 13, 2002, respectively.

To the extent that the Eleventh Circuit rescinded that portion of its July 10, 2001 decision concerning the applicability of Fla. Stat. §768.79, *at most* Petitioner might be entitled to appellate attorney's fees only insofar as he expended fees on his second petition for rehearing relating to the impact of the *BDO Seidman* opinion. Appellants had won on the issue of the applicability of Fla. Stat. §768.79. Appellants cannot be held accountable for a change in Florida law occurring *after* the July Opinion.

However, on the present record, and as explained below, Petitioner is entitled to no appellate fees for work done in connection to its successful application for rehearing.

**(3) The Fla. Stat. §768.79 Does Not Allow "Fees for Fees"**

Respondents argued below that even if petitioner could recover attorney's fees in connection with the Eleventh Circuit's reversal of its prior opinion, petitioner would not be entitled to appellate fees on the present record. He sought to recover $100,658.83 in appellate fees and $3,242.31 in costs. This totals approximately 50% of the amount Petitioner claimed to have expended in defending this action at the District Court level through the eve of trial which has already been awarded. This unconscionable claim is premised on time mostly expended in arguing about the amount of attorney's fees, the so-called "fees for fees", which cannot be recovered. Petitioner consequently asserts that he cannot distinguish

between time expended for work obtaining the reversal of this Court's prior denial of attorney's fees and the amount of those fees. Accordingly, all fee claims should be denied. The maximum amount of attorney's fees to which petitioner might have been entitled is $4,483.

To conceal this small amount, petitioner argued that he is entitled to counsel fees and expenses in litigating the amount of attorney's fees. Petitioner further represented that he was unable to separate those fees in connection with substantive matters from the fees resulting from his litigation of the amount of attorney's fees.

There is no doubt that petitioner was not entitled to seek "fees for fees" regardless if the fees are for a case in chief *or on appeal*. Thus, the Eleventh Circuit in its November 6, 2002 decision (311 F.3d at 1085-1086) quoted from *State Farm Fire & Cas. Co., v. Palma,* 629 So.2d 830, 833 (Fla.1993) in holding that "'[t]he Florida State Supreme Court has held that, while attorney's fees incurred for litigating the issue of entitlement to attorney's fees are recoverable, fees incurred for litigating the amount of the fees are not.'"

In the face of this overarching holding in *Palma,* there is no authority to support petitioner's contention that Florida law is unclear as to whether the "fees for fees" prohibition does not apply to appellate "fees for fees". The Eleventh Circuit stated as much when it adopted *Palma* in rejecting petitioner's prior claim for appellate attorney's fees. This Court stated that the (311 F.3d at 1085-1086) "... purpose [of Fla. Stat. §768.79] does not include encouraging the representation of indigents and does not support an award of attorney's fees incurred litigating the amount of those fees." Although *Palma* concerned a contingency fee application, the Eleventh Circuit rejected petitioner's attempt to distinguish

*Palma* on that basis (311 F.3d at 1085-1086). Moreover, there is no doubt that *Palma* applies to applications under Fla. Stat. §768.79. *Oruga Corporation, Inc. v. AT&T Wireless of Florida, Inc.*, 712 So.2d 1141, 1145 (Fla. 3d DCA 1998)(stating that the reasoning in Palma applies to an analysis under §768.79). As noted in *Oruga, supra,* "[s]uch work inures exclusively to the attorney's benefit,...."

Nor was there any authority to support petitioner's contention that the purpose of Fla. Stat. §768.79 is to prevent opponents from filing objections to fee applications

**(4) There Was No Showing That Petitioner Has Paid Any Portion of the Fees Demanded and Certain Amounts Claimed Are Not Recoverable**

Petitioner's claim for fees should also be denied because there is no showing that Petitioner has paid any portion of the fees which are the subject of the instant motion. There is a balance stated on each bill and no reflection of any payment having been made.

Undoubtedly, this is because most of the time was expended in arguing the amount of attorney's fees to which Petitioner's counsel is entitled. These Statements are particularly suspect in light of the fact that they represent 50% of the total amount claimed for work on the District Court level.

Given that petitioner's counsel previously discounted prior bills, this suggests that counsel's bills may not be the final amount charged to Petitioner.

Petitioner has not only improperly sought fees in connection with its fee claims, but also the costs of Lexis charges. Such charges are not allowable since that "'would be

tantamount to charging the losing party for the prevailing party's law library books.'" *Texler v. County of Summit*, 25 F.3d 1050 (6th Cir. 1994). Similarly improper are claims for general office expenses such as long distance telephone calls and delivery services. These charges are considered to be office overhead not to be passed on to an adversary in a claim for fees. *See, e.g., Seminole County v. Chandrinos*, 816 So.2d 1241 (Fla. 5th DCA 2002).

Therefore, based on the instant record, and even if Petitioner were entitled to recover attorney's fees for bringing *BDO Seidman* to this Court's attention, Petitioner is not entitled to any appellate fee award.

## CONCLUSION

For the foregoing reasons, petitioner's request that this Court issue a writ of mandamus to the Eleventh Circuit Court of Appeals and individually to Judges Marcus, Carnes and Hand should be denied in all respects.

Dated: September 11, 2003

Respectfully submitted,

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# APPENDIX

UNITED STATES COURT OF APPEALS

THE ELEVENTH CIRCUIT

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Case No.: 00-10323
00-14728-FF
00-14990-FF

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NEMESIS VERITAS, L.P. f/k/a
MCMAHAN & COMPANY AND
D. BRUCE MCMAHAN

*Plaintiffs - Appellants/*
*Cross-Appellees*

-v.-

WILLIAM A. TOTO,

*Defendant- Appellee/*
*Cross-Appellant.*

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**APPELLANTS' RESPONSE TO "TOTO'S MOTION FOR RECONSIDERATION" DATED FEBRUARY 24, 2003**

Plaintiffs-Appellants-Cross-Appellees ("Appellants") hereby respond to "Toto's Motion for Reconsideration of Denial of Appellate Fees and Expenses as Contrary to Florida Law and for Partial Recall of Mandate" dated February 24, 2003, and state as follows:

1. Defendant-Appellee-Cross-Appellant Toto has improperly couched his request for relief as a "motion" pursuant to Rule 40, Fed. R. App. P. There is no procedure for a "motion" to be filed under Rule 40. Rule 40, Fed.R.App.P., relates to the filing of a petition for panel rehearing, and no response is allowed unless the Court so requests. Rule 40(a)(3), Fed.R.App.P. Here, Toto has misleadingly labeled his submission as a motion, and the Clerk has requested that responsive papers be filed by March 10, 2003. Therefore, we respond at the Clerk's direction without knowing if the Court desired a response or not.

2. It should also be noted that Toto's request for relief pursuant to Rule 40, Fed.R.App.P., has been made to the original panel, not pursuant to Rule 35, Fed.R.App.P., for *en banc* reconsideration. Further, insofar as Toto seeks a partial recall of the mandate, such a motion is heard by a single judge. *See* 11th Cir. R. 27-1 (d); Rule 41, IOP 1.

3. Toto's petition for panel rehearing should be denied. Eleventh Circuit Rule 41-1(b) states: "A mandate once issued shall not be recalled except to prevent injustice." Therefore, the sole issue before this Court is whether the denial of fees constitutes an injustice.

4. This panel's Order denying fees evidences that it would have been an injustice to grant the over $100,000 in additional fees requested by Toto. As the panel will recall, this Court initially denied attorney's fees under Fla. Stat. §768.79. However, months after this Court's determination, and after the decision had been printed in the hard covered case books, the intermediate Florida appellate court decided *BDO Seidman v British Car Auctions,* 802 So.2d 366 (Fla. 4th DCA 2001) which caused this Court to amend its opinion to grant

attorney's fees. Thereafter, Toto sought over $100,000 in additional attorney's fees for basically shepardizing this Court's decision, finding that *BDO Seidman* had disagreed with it and bringing *BDO Seidman* to this Court's attention.

5. Accordingly, this Court emphatically stated in denying additional attorney's fees:

> The motion for litigation expenses is DENIED.
>
> The alternative motion to find Appellee entitled to attorney's fees is DENIED.
>
> The alternative motion for remand is DENIED.
>
> This appeal is over.

A copy of this Court's denial is annexed hereto as Exhibit "A".

6. Moreover, there is nothing new in Toto's "motion" that has not already been considered by this Court. Accordingly, for brevity's sake, appellants hereby submit a copy of their papers previously submitted in opposition to Toto's last request for fees and incorporates the substance herein as their further response to Toto's "motion" for reconsideration. See Exhibit "B" hereto.

7. For the foregoing reasons and for the reasons set forth in Exhibit "B" hereto, appellants respectfully request that this Court deny Toto's request for relief.

Dated: March 8, 2003

Respectfully submitted,
ISAACS & EVANS, LLP

By: /s/ Patti E. Evans
PATTI E. EVANS
*Attorneys for appellants*
521 Fifth Avenue, 17th floor
New York, New York 10175

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy and correct copy of the foregoing was mailed this 8th day of March 2003 to the attorneys for defendant-appellee-cross-appellant: Hendrik G. Milne, Esq., Aballi, Milne, Kalil & Escagedo, P.C., 2250 SunTrust International Center, One Southeast Third Avenue, Miami, Florida 33131, and a copy of same was served by the same method to Stanley A. Beiley, Esq., Sacher, Hartman & Waldman, P.A., 1401 Brickell Avenue, Suite 700, Miami, FL 33130-9543.

By: /s/ Patti E. Evans
PATTI E. EVANS

**EXHIBIT A**

UNITED STATES COURT OF APPEALS

THE ELEVENTH CIRCUIT

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Case No.: 00-10323
00-14728

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D. BRUCE MCMAHAN
NEMESIS VERITAS,
f.k.a. MCMAHAN & COMPANY

*Plaintiffs - Appellants*
*Cross-Appellees*

-v.-

WILLIAM A. TOTO,

*Defendant- Appellee*
*Cross-Appellant.*

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On Appeal from the United States District Court
for the Southern District of Florida

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BEFORE: CARNES and MARCUS, Circuit Judges, and HAND[1], District Judge.

BY THE COURT:

Appellee's "Petition for Appellate Fees and Costs...," construed as a petition for attorney's fees and litigation expenses, or in the alternative as a motion to find Appellee entitled to the same and to remand to district court to determine the amount to be awarded, is before the Court.

The motion for litigation expenses is DENIED.

The alternative motion to find Appellee entitled to attorney's fees is DENIED.

The alternative motion for remand is DENIED.

The appeal is over.

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[1] The Honorable William B. Hand, U.S. District Judge for the Southern District of Alabama, sitting by designation.

**EXHIBIT B**

UNITED STATES COURT OF APPEALS

THE ELEVENTH CIRCUIT

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Case No.: 00-10323
00-14728
00-14990

USDC Case No: 96-8294

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NEMESIS VERITAS, L.P. f/k/a
MCMAHAN & COMPANY AND
D. BRUCE MCMAHAN

*Plaintiffs - Appellants*
*Cross-Appellees*

-v.-

WILLIAM A. TOTO,

*Defendant- Appellee*
*Cross-Appellant.*

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**APPELLANT'S OBJECTIONS TO APPELLEE'S PETITION FOR APPELLATE FEES AND COSTS AND MOTION FOR DIRECTIONS DATED NOVEMBER 16, 2002**

Plaintiff's-Appellants-Cross-Appellees ("Appellants") hereby respond to Defendant-Appellee-Cross-Appellant Toto's Petition for Appellate Fees and Costs and Motion for Directions with Verified Bill of Fees, Costs and Supporting Affidavit and state as follows.

1. Toto's application for appellate fees and costs should be denied for the following reasons. First, there is presently pending a petition for *en banc* review of this Court's reversal of its denial of attorney's fees. Therefore, this Court's decision awarding attorney's fees will not be final until Appellants' petition is decided. *En banc vacatur* of that determination would moot the instant application.

2. Second, with respect to costs, Toto's application is untimely under Rule 39, Fed.R.App.P. and Internal Operating Procedure "1" thereunder. Toto never previously applied to recover costs and is foreclosed from seeking those costs now.

3. Third, this court has already denied Toto appellate fees under orders entered December 11, 2001 (Ex. "A") and July 13, 2001 (Ex. "B").

4. Fourth, even if Toto could recover attorney's fees in connection with this Court's reversal of its prior opinion, Toto would not be entitled to appellate fees on the present record. He has sought to recover $100,658.83 in appellate fees. This totals approximately 50% of the amount Toto claimed to have expended in defending this action at the District Court level through the eve of trial which has already been awarded. As explained below, this unconscionable claim is premised on time mostly expended in arguing about the amount of attorney's fees, the so-called "fees for fees", which cannot be recovered. Toto consequently asserts that he cannot distin-

guish between time expended for work obtaining the reversal of this Court's prior denial of attorney's fees and the amount of those fees. Accordingly, all fee claims should be denied.[1]

5. Moreover, the Statements provided by Toto evidence no payment by Mr. Toto. This is undoubtedly because most of the time was expended in arguing the amount of attorney's fees to which Toto's counsel is entitled. Considering that Toto's counsel has discounted prior bills, it appears that the Statements submitted may not be the final amount charged to Toto.

6. Fifth, at most Toto is entitled to $4,483 in appellate fees. This is the amount it cost Toto to cause this Court to reverse its prior opinion by bringing to the Court's attention the Florida District Court opinion in *BDO Seidman v. British Car Auction, Inc.* 802 So. 2d 366 (Fla 4th DCA 2001) which was decided after this Court's decision denying attorney's fees, but prior to issuance of the mandate.

## BACKGROUND AND PRIOR PROCEEDINGS

7. This was an action for tortious interference with contractual relations. Toto caused former limited partners of appellant Nemesis Veritas L.P. to sue it and appellant D. Bruce McMahan under, *inter alia,* the Racketeer Influenced and Corrupt Organizations Act in violation of assignments and releases contained in Contracts of Sale and Security

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[1] To further complicate matters, Toto has included in the instant application additional fees for District Court work which he has not sought to separate from the appellate fees (Milne Verified Bill, ¶ 5). Toto himself admits that this Court lacks jurisdiction to make an award of fees for District Court work.

Agreements (the "Contracts") whereby said limited partners sold their interests to appellants. The action sought $30 million in damages.[2]

8. The consolidated appeals and cross-appeals in this case concerned various orders of the United States District Court for the Southern District of Florida. They were decided by this Court's July 10, 2001 opinion, 256 F.3d 1120 (11th Cir. 2001), *amended* F.3d , 2002 WL 31477305 (11th Cir. 2002) (the "July Opinion"). The July Opinion: (1) affirmed the District Court's grant of summary judgment dismissing the complaint and therefore denied a portion of Appellants' appeal; (2) reversed the District Court's grant of attorney's fees pursuant to Fla. Stat. §768.79 and therefore granted that part of Appellants' appeal; and (3) affirmed the trial court's denial of sanctions against Appellants and their counsel.

9. In orders entered December 11, 2001 (Ex. "A") and July 13, 2001 (Ex. "B"), Toto was denied appellate attorney's fees. All fee claims other than those contained in the bills dated December 21, 2001 and February 8, 2002 (Milne Verified Bill, Exs. "I" and "J") were thereby decided adversely to Toto. Toto never applied to recover costs.

10. Prior to the issuance of the mandate, and on September 30, 2001, *BDO Seidman v. British Car Auction, Inc.*, 802 So.2d 366 (Fla 4th DCA 2001), was decided. *BDO Seidman* contradicted this Court's holding in the instant case that Fla. Stat. §768.79 did not apply in a diversity case litigated in Florida where the substantive issues were gov-

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[2] In support of his claim for inflated counsel fees, Toto repeatedly mischaracterizes the claim as one for $90 million.

erned by the law of another state. *Seidman* specifically refused to apply a conflict of laws analysis as required under Federal law. *Seidman* cited to this Court's decision and was undoubtedly "picked up" by shepardizing this case.

11. Toto thereupon renewed its prior motion for reargument. The billing records disclose that Toto was purportedly charged $4,483 for 25.55 hours of work primarily performed by law clerks to bring *BDO Seidman* to this Court's attention, *see* Milne Verified Bill Ex. "I", entries 11/15 - 11/20/01.

12. By opinion dated November 6, 2002, this Court rescinded part of its July Order (the "November Opinion") and held that, while there was no controlling authority when it issued its July Opinion, *BDO Seidman* now represented Florida law on the issue of whether Fla. Stat. §768.79 applied in a federal diversity case litigated in Florida where the substantive issues were governed by the law of another state. Accordingly, this Court reversed its prior opinion and held that attorney's fees were recoverable by Toto.

13. Immediately after that decision, Appellants petitioned for *en banc* reconsideration. Appellants contended that, in reversing its prior opinion denying attorney's fees, the panel contradicted federal law by applying the law of the forum state without conducting the required choice of law analysis. Appellants' petition is currently pending.

## ARGUMENT

### A. TOTO'S MOTION IS PREMATURE

14. Toto's motion is premature. This Court's November 6, 2002 decision granting Toto attorney's fees will not be final

until Appellants' petition for rehearing *en banc* has been decided. Fed.R.App.P. Rule 41(d) (1) provides for an automatic stay of the mandate on a timely filing of a petition for rehearing or *en banc* review. Therefore, this Court cannot reach the issue of attorney's fees and costs until it decides Appellants' petition for rehearing *en banc*.

**B. TOTO CANNOT RECOVER COSTS**

15. Toto is foreclosed from seeking costs under Fed.R.App.P. Rule 39 at this late date. Rule 39 (d) (1), Fed.R.App.P., provides that " [a] party who wants costs taxed must – within 14 days after entry of judgment – file with the circuit clerk, with proof of service, an itemized and verified bill of costs." This Court's Internal Operating Procedure "1" for Fed.R.App.P. Rule 39 confirms the 14 day requirement and also provides that "[t]he filing of a petition for rehearing or petition for rehearing *en banc* does not extend the time for filing a bill of costs."

16. Therefore, if Toto wanted costs taxed in his favor, he was required to, but did not, file such a request by July 24, 2001. Additionally, the Clerk of this Court has determined that "[e]ach party to bear its own costs" (Exhibit "A" hereto), recognizing that these consolidated appeals netted a mixed result for both parties.

**C. THIS COURT HAS ALREADY DETERMINED THAT TOTO IS NOT ENTITLED TO APPELLATE FEES**

17. This Court has already held that Toto is not entitled to appellate attorney's fees. Toto previously moved for appellate attorney's fees in connection with appeals of the District Court's grant of summary judgment and attorney's fees under

Fla. Stat. §768.79. The motions were fully briefed by the parties. The motions were denied by Orders entered December 11, 2001 (Ex., "A") and July 13, 2001 (Ex. "B"), respectively.

18. To the extent that this Court rescinded that portion of its July 10, 2001 decision concerning the applicability of Fla. Stat. §768.79, at *most* Toto might be entitled to appellate attorney's fees only insofar as he expended fees on his second petition for rehearing relating to the impact of the *BDO Seidman* opinion. Prior to the decision in *BDO Seidman*, Appellants had succeeded in reversing the lower court on the issue of the applicability of Fla. Stat. §768.79. This Court therefore denied Toto's application for attorney's fees. Appellants should not be held accountable for a change in Florida law occurring *after* the July Opinion.

19. However, on the present record, and as explained below, Toto is entitled to no appellate fees for work done in connection with its successful application for rehearing.

**D. TOTO IS ENTITLED TO NO FEES BASED ON THE PRESENT RECORD**

**i) Toto has not distinguished between the time it expended in bringing *BDO Seidman* to the Court's attention and the time expended in litigating the amount of fees to which he is purportedly entitled**

20. The maximum amount of attorney's fees to which Toto might be entitled is $4,483. To conceal this small amount, Toto argues that he is entitled to counsel fees and expenses in litigating the amount of attorney's fees. Toto further represents that he is unable to separate those fees in

connection with substantive matters from the fees resulting from his litigation of the amount of attorney's fees.

21. There is no doubt that Toto is not entitled to seek "fees for fees" regardless if the fees are for a case in chief or on *appeal*. Thus, in its November 6, 2002 decision (2002 WL 31477305 at *7), this Court quoted from *State Farm Fire & Cas. Co., v. Palma*, 629 So.2d 830, 833 (Fla. 1993) in holding that " '[t]he Florida State Supreme Court has held that, while attorney's fees incurred for litigating the issue of entitlement to attorney's fees are recoverable fees incurred for litigating the amount of the fees are not.' "

22. In the face of this overarching holding in *Palma*, there is no authority to support Toto's contention that Florida law is unclear as to whether the "fees for fees" prohibition does not apply to appellate "fees for fees". This Court has stated as much when it adopted *Palma* in rejecting Toto's prior claim for appellate attorney's fees. This court stated that the (2002 WL 31477305 at *7) "... purpose [of Fla. Stat. §768.79] does not include encouraging the representation of indigents and does not support an award of attorney's fees incurred litigating the amount of those fees." Although *Palma* concerned a contingency fee application, this Court rejected Toto's attempt to distinguish *Palma* on that basis (2002 WL 31477305 at *8). Moreover, there is no doubt that *Palma* applies to applications under Fla. Stat. §768.79. *Oruga Corporation, Inc. v. AT&T Wireless of Florida, Inc.*, 712 So. 2d 1141, 1145 (Fla. 3d DCA 1998) (stating that the reasoning in *Palma* applies to an analysis under §768.79). As noted in *Oruga*, supra, "[s]uch work inures exclusively to the attorney's benefit,..."

23. Nor is there any authority to support Toto's contention that the purpose of Fla. Stat. §768.79 is to prevent

opponents from filing objections to fee applications. To argue that Appellants were wrong in objecting to the amount of fees sought by Toto when each objection was fully supported by case law is absurd. Indeed, as admitted by Toto, this Court sustained many of those objections. The procedure in the District Court and in this Court provides for objections to be filed in opposition to another party's application for fees and costs. This Court cannot punish Appellants for filing objections allowed under the rules. Certainly, if attorney fees had been awarded Appellants, Toto would have filed the same type of objections and cited the same cases as Appellants did.

**ii) There is no showing that Toto has paid any portion of the fees demanded and certain amounts claimed are not recoverable.**

24. Toto's claim for fees should also be denied because there is no showing that Toto has paid any portion of the fees which are the subject of the instant motion. There is a balance stated on each bill and no reflection of any payment having been made.

25. Undoubtedly, this is because most of the time was expended in arguing the amount of attorney's fees to which Toto's counsel is entitled. These Statements are particularly suspect in light of the fact that they seek approximately 50% of the total amount claimed for work on the District Court level despite the fact that all appellate work pre-*BDO Seidman* was a rehash of the arguments made in the District Court.

26. Given that Toto's counsel previously discounted prior bills, this suggests that counsel's bills may not be the final amount charged to Toto.

27. Toto has not only improperly sought fees in connection with its fee claims, but also the costs of Lexis charges. Such charges are not allowable since that " 'would be tantamount to charging the losing party for the prevailing party's law library books.' " *Texler v. County of Summit*, 25 F. 3d 1050 (6th Cir. 1994). Similarly improper are claims for general office expenses such as long distance telephone calls and delivery services. These charges are considered to be office overhead not to be passed on to an adversary in a claim for fees. *See, e.g., Seminole County v. Chandrinos*, 816 So.2d 1241 (Fla. 5th DCA 2002).

28. Therefore, based on the instant record, and even if Toto were entitled to recover attorney's fees for bringing *BDO Seidman* to this Court's attention, Toto is not entitled to any appellate counsel fees based on the instant record.

## E. TOTO IS ENTITLED TO AT MOST $4,483 AND NOT THE $100,658.83 SOUGHT BY TOTO

29. As explained above, the maximum amount of attorney's fees to which Toto might be entitled is $4,483. This represents the fees charged for presenting *BDO Seidman* to this Court and obtaining the reversal of this Court's previous denial of attorney's fees.

30. As explained above, under no circumstances should this Court reverse its prior determinations and award Toto appellate counsel fees for work performed prior to *BDO Seidman*.

31. Nevertheless, even if Toto were entitled to appellate counsel fees for work performed prior to the rendering of *BDO Seidman*, he could not be entitled to the $100,658.83 sought.

32. First, this amount represents approximately 50% of the total fees asserted at the District Court level to have been generated as a result of full discovery, two motions for summary judgment and completed trial preparation.[3] It is therefore unconscionable.

33. Second, the work performed by Toto's counsel, to the extent it concerns substantive matters, reflects those arguments made in the District Court. Their presentation on appeal was merely a "cut and paste" word processing exercise converting the briefs from the District Court into appellate form.

34. Third, Toto has included in the instant application additional fees for District Court work which he has not sought to separate from the appellate fees (Milne Verified Bill, ¶5). Toto himself admits that this Court lacks jurisdiction to make an award of fees for District Court work.

35. Fourth, even if fees are granted retroactively in connection with appellate work, Toto was ultimately successful only in opposing Appellants' appeal of the dismissal of the complaint. While Toto has been so far successful in sustaining the District Court's grant of attorney's fees based on the subsequently decided *BDO Seidman* opinion was issued, Toto was totally unsuccessful in his cross-appeal of the denial of sanctions.

36. Therefore, if Toto is entitled to appellate fees prior to *BDO Seidman's* issuance, it should only be in respect of work performed in connection with the affirmance of the District

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[3] As explained above, summary judgment was granted by the District Court the day before trial was to have commenced.

Court's grant of summary judgement. This work is described in the Statement dated June 16, 2000 (Milne Verified Bill, Ex. "A") and amounts to $19,045 in fees.

37. Finally, this Court should decide the issue of appellate fees and costs on its own without referral to the District Court. Accordingly no award should be made on the present record.

Dated: December 28, 2002

Respectfully submitted,
ISAACS & EVANS, LLP

By: /s/ Patti E. Evans
PATTI E. EVANS
*Attorneys for Appellants*
10 East 39th Street
New York, New York 10016

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy and correct copy of the foregoing was mailed this 30th day of December 2002 to the attorneys for defendant-appellee-cross-appellant: Hendrik G. Milne, Esq., Aballi, Milne, Kalil & Escagedo, P.C., 2250 SunTrust International Center, One Southeast Third Avenue, Miami, Florida 33131, and a copy of same was served by the same method to Stanley A. Beiley, Esq., Sacher, Hartman & Waldman, P.A., 1401 Brickell Avenue, Suite 700, Miami, FL 33130-9543.

By: /s/ Patti E. Evans
PATTI E. EVANS

**EXHIBIT A**

UNITED STATES COURT OF APPEALS

THE ELEVENTH CIRCUIT

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No. 00-14728

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D. BRUCE MCMAHAN
NEMESIS VERITAS,
f.k.a. MCMAHAN & COMPANY

*Plaintiffs - Appellants*
*Cross-Appellees*

-v.-

WILLIAM A. TOTO,

*Defendant- Appellee*
*Cross-Appellant.*

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On Appeal from the United States District Court
for the Southern District of Florida

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ORDER:

Appellee's motion for appellate fees is hereby DENIED.

By: /s/ Ed Carnes

Ed Carnes

**UNITED STATES**

**CIRCUIT JUDGE**

**EXHIBIT B**

UNITED STATES COURT OF APPEALS

THE ELEVENTH CIRCUIT

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No. 00-10323-FF
&
No. 00-14728-FF

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D. BRUCE MCMAHAN
NEMESIS VERITAS,
f.k.a. MCMAHAN & COMPANY

*Plaintiffs - Appellants*
*Cross-Appellees*

-v.-

WILLIAM A. TOTO,

*Defendant- Appellee*
*Cross-Appellant.*

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On Appeal from the United States District Court
for the Southern District of Florida

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BEFORE: CARNES and MARCUS, Circuit Judges, and HAND[1], District Judge.

BY THE COURT:

Appellee's motion to find him entitled to appellate attorney's fees in Appeal No. 00-10323 is DENIED.

Appellee's motion for remand in Appeal No. 00-10323 is DENIED AS MOOT.

Appellants' motion for reconsideration of the August 14, 2001, order striking their bill of costs in Appeal No. 00-14728 is DENIED.

Patti E. Evans
10 East 39th Street, Suite 531
New York, New York 10016

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December 11, 2001

RE: 00-10323-FF
*D. Bruce McMahan v William A. Toto*
DC DKT NO.: 96-08294 CV-DMM

cc: Leigh R. Isaacs
cc: Patti E. Evans
cc: Hendrik G. Milne
cc: Richard A. Beiley
cc: Administrative File.

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[1] The Honorable William B. Hand, U.S. District Judge for the Southern District of Alabama, sitting by designation.

UNITED STATES COURT OF APPEALS

THE ELEVENTH CIRCUIT
56 FORSYTH STREET, N.W.
ATLANTA, GEORGIA 30303

December 11, 2001

RE: 00-10323-FF
*D. Bruce McMahan v William A. Toto*
DC DKT NO.: 96-08294 CV-DMM

The following action has been taken in the referenced case:

The enclosed order has been ENTERED.

Sincerely,

THOMAS K. KAHN, Clerk
Reply to: Carol P. Lewis
(404) 335-6175